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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/578,864

06/22/2006

Bernd Lang

4750-46

3273

23117 7590 03/24/2010  
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EXAMINER

MORAN, KATHERINE M

ART UNIT

PAPER NUMBER

3765

MAIL DATE

DELIVERY MODE

03/24/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/578,864	<b>Applicant(s)</b> LANG ET AL.	
	<b>Examiner</b> KATHERINE MORAN	<b>Art Unit</b> 3765	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 October 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-9 and 22-30 is/are pending in the application.
- 4a) Of the above claim(s) 22-30 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 May 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>7/22/09</u> . | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Response to Amendment***

Applicant's response of 10/26/09 has been received and reviewed. Claims 2-9 are amended, claims 10-21 are cancelled, and new claims 22-30 are added. Claims 1-9 and 22-30 are pending. An IDS of 7/22/09 has also been received. This is a second non-final office action.

1. Newly submitted claims 22-30 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: claims 22-30 teach a breathing mask arrangement including a mask in combination with a headband arrangement. This invention has classification in 128/207.17.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 22-30 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1-7 are rejected under 35 U.S.C. 102(b) as being anticipated by Magidson (U.S. 5,829,062). Magidson discloses the invention as claimed. Magidson teaches a headband means 12 for applying a breathing mask to a user and having a flexible band body comprising upper and lower band portions for transmitting the mask holding forces required for applying the mask, wherein at least portions of the body are

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made of a foamed plastic material (col.3, lines 25-27). Regarding claim 2, "band body formed by injecting a pore-forming plastic material in a molding space of a tool" is a product by process limitation and as such, does not receive patentable weight in an apparatus claim. Magidson teaches a structurally equivalent headband means. As discussed in MPEP 2113, when the product by process claim is limited by and defined by the process, determination of patentability is based on the product itself. The patentability of the product does not depend on its method of production. If the product in the product by process claim is the same or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. Therefore, only the claimed structure is considered when assessing patentability. Insert 22 is embedded in the foamed plastic material and the insert includes a locking structure 14 uncovered by the foamed plastic material. The insert 22 is a dimensionally stable insert and the locking structure is structured to couple a band bracket portion in an adjustable manner. The locking structure 14 is formed integrally with the foamed plastic material.

4. Claims 1 and 4-9 are rejected under 35 U.S.C. 102(b) as being anticipated by Madaus et al. (U.S. 2004/0025882). Madaus discloses the invention as claimed. Madaus teaches a headband means for applying to a breathing mask, with the band body having upper and lower band portions 8,5 including a tensile proof and dimensionally stable insert 4, the insert including a locking structure 76 structured to couple a band bracket portion in an adjustable manner. Madaus teaches that the insert 4 prevents deformation of the band and reinforces the band. Madaus teaches that the

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insert 4 is formed of thermoplastic material and a lower band portion is formed from an open cell foam layer 5 overlying one side of the insert. Thus, at least portions of Madaus' band body are made of a foamed plastic material. The headband means further comprises a slide element 77 that can be brought in different closing positions on the locking structure and would slide over the locking structure during attachment or when brought into contact with the locking structure. A locking mechanism (not labeled) is shown in Figure 7 on the front surface of slide element 77 and serves to lock the slide element on the locking structure.

### ***Response to Arguments***

5. Applicant's arguments have been considered. Applicant submits that Bryant doesn't teach foamed thermoplastic band body portions. The Examiner agrees and this rejection is withdrawn as outlined above.

### ***Conclusion***

6. Any inquiry concerning this communication or earlier communications should be directed to Primary Examiner Katherine Moran at (571) 272-4990. The examiner can be reached on Monday-Thursday from 8:30 am to 6:00 pm, and alternating Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gary Welch, may be reached at (571) 272-4996. The official and after final fax number for the organization where this application is assigned is (571) 273-8300. General information regarding this application may be obtained by contacting the Group Receptionist at (571) 272-3700.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Katherine Moran/

Primary Examiner, AU 3765